

NO. PD-0424-19

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/21/2019
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LARRY THOMAS CHAMBERS, JR.
APPELLANT,

VS.

THE STATE OF TEXAS,
APPELLEE

***APPELLANT'S
BRIEF ON THE MERITS***

NO. 06-18-00244-CR
COURT OF APPEALS FOR THE
THIRD DISTRICT OF TEXAS AT AUSTIN

On appeal from Cause Number 170683-K277
in the 277th District Court of Williamson County, Texas
Honorable Stacey Matthews, Presiding

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IDENTITIES OF PARTIES AND COUNSEL

Pursuant to the provisions of Tex. R. App. P. 38.1(a), a complete list of the names of all parties to this action and counsel are as follows:

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State of Texas, Appellee

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES Larry Thomas Chambers, Jr., Appellant in this case, by and through his attorney, Keith S. Hampton, and, pursuant to the provisions of Tex. R. App. Pro. 38, *et seq.*, files this brief on the merits.

STATEMENT OF THE CASE

A jury found Appellant guilty of possession of a controlled substance, four grams but less than 200 grams. (CR, pp. 34; 115). The jury assessed Appellant's punishment at twenty years' confinement in the Texas Department of Criminal Justice. (CR, p. 126). Appellant timely filed written notice of appeal on May 7, 2018. (CR, p. 135).

This brief was due on November 1, 2019. However, this Court extended the time, on Appellant's *Motion for Extension of Time to File Brief*, to November 18, 2019, and is timely filed.

ISSUE PRESENTED

GROUND FOR REVIEW: Is Appellant entitled to an instruction pursuant to Article 38.23 of the Code of Criminal Procedure when there is a factual dispute regarding the officer's credibility and a conflict between his testimony and his dashcam video?

SUMMARY OF THE PERTINENT FACTS

Police officer Sam Connell stopped Appellant because Appellant's truck did not have a rear license plate. (Vol. 7, pp. 77; 83; 92). However, Appellant's truck did have a rear license plate. (Vol. 7, pp. 140; 142). Video and photographic evidence recorded the events and the appearance of the rear license plate. (State's exhibit 2)(photo of rear of truck); (State's exhibit 3)(video of Connell's dashcam); (State's exhibit 4)(photo of defendant at traffic stop); (State's exhibit 5)(video of Connell's body camera); (State's exhibit 6)(photo of rear of truck); (State's exhibit 7)(photo license plate); (State's exhibit 8)(video of Weaver's body camera); (State's exhibit 10)(video of Wilson's body camera).

SUMMARY OF THE ARGUMENT

The police officer who stopped Appellant testified that he never saw Appellant's rear license plate. Four videos and four photographs admitted into evidence contradict his testimony. The evidence created a factual controversy: the officer either truly never saw the license plate or he saw it and detained Appellant anyway. This factual dispute was one a jury is entitled to resolve. The trial court therefore should have, upon timely request, instructed the jury pursuant to Article 38.23 of the Code of Criminal Procedure.

ARGUMENT

Is Appellant entitled to an instruction pursuant to Article 38.23 of the Code of Criminal Procedure when there is a factual dispute regarding the officer's credibility and a conflict between his testimony and his dashcam video?

Round Rock patrol sergeant Sam Connell testified he stopped Appellant because he said he saw no license plate. (Vol. 7, pp. 77; 83). As he testified, "I did not believe that there was a license plate displayed to the rear of the vehicle." (Vol. 7, p. 92).¹ After the stop, however, Connell discovered that the truck did have a temporary but expired permit. (Vol. 7, pp. 140; 142)(State's exhibits 6 & 7).

The State introduced eight items of visual evidence: four videos and four photographs. (State's exhibit 2)(photo of rear of truck); (State's exhibit 3)(video of Connell's dashcam); (State's exhibit 4)(photo of defendant at traffic stop); (State's exhibit 5)(video of Connell's body camera); (State's exhibit 6)(photo of rear of truck); (State's exhibit 7)(photo license plate); (State's exhibit 8)(video of Weaver's body camera); (State's exhibit 10)(video of Wilson's body camera). This evidence would entitle jurors to draw the conclusion that Connell did see a license plate.

¹ Appellant did not immediately pull over after Connell activated his lights, but traveled another quarter of a mile before stopping. (Vol. 7, pp. 84-85). Connell had radioed police dispatch to inform them he was pulling over a truck, but that he could see no license plate. (Vol. 7, p. 87). Four other officers, Officer Todd Spradlin, Officer Lauren Weaver, Ryan Wilson, and Sergeant Jeff Kopp, appeared at the scene of the detention. (Vol. 7, pp. 93-95). Both Connell and Spradlin had their weapons drawn. (Vol. 7, p. 96).

Appellant's counsel requested an instruction pursuant to Article 38.23 of the Code of Criminal Procedure, but the trial court denied the request. (Vol. 8, pp. 6-17).

Article 38.23 of the Code of Criminal Procedure states:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Tex. Code Crim. Pro. art. 38.23.

The statutory exclusionary rule was enacted in 1925. Act of March 30, 1925, 39th Leg., R.S., ch. 149, 1925 Tex. Gen. Laws 357. The provision regarding jury resolution was first proposed in 1963 in a rewrite of the Code of Criminal Procedure, but Governor John B. Connally, Jr. was forced to veto the measure. Tex. S.B. 270, 58th Leg., R.S. (1963).² The Legislature enacted it again in 1965 and it has remained unchanged ever since. Acts 1965, 59th Leg., ch. 722 (S.B. 107), effective January 1,

² The Governor's proclamation stated in pertinent part: "I disapprove, and am vetoing and filing with the Secretary of State Senate Bill 270 revising the Code of Criminal Procedure. Information which has come to light during the last few days, reveals that the version of Senate Bill 270 received in my office is not the same version which was passed by either house of the Fifty-eighth Legislature. While I do not know the cause of this discrepancy, to sign such a bill into law would be in derogation of the Constitutional requirement that all provision of laws must be approved by a majority of both houses of the Legislature prior to becoming effective." Veto Message of Governor Connally, Tex. S.B. 270, 58th Leg. R.S. (1963).

1966. Senator Dorsey Hardeman was the sponsor.

Connell stopped Appellant because said he did not see a rear licence plate. The issue is whether Connell actually failed to see the plate or did see the plate, but decided to falsely claim he did not. Connell testified he did not see it, while the dashcam and photographs indicate that he did see it.

The trial court should have instructed the jury that Connell had the authority to stop Appellant only if he had reasonable suspicion that Appellant's truck lacked a rear license plate. The trial court should have further instructed that if it believed Connell did see the plate, it should disregard all evidence obtained after the stop.

To be entitled to an instruction pursuant to this Article, three requirements must be met: “(1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.” *Hamal v. State*, 390 S.W.3d 302, 309 (Tex.Crim.App. 2012)(quoting *Madden v. State*, 242 S.W.3d 504, 510 (Tex.Crim.App. 2007)).

The jury heard evidence that raised the factual issue of whether Connell saw the plate. That evidence was Connell's own testimony and the visual evidence which conflicted with his testimony. Thus, the first requirement is satisfied.

Madden is on point. The officer's dashcam reflected that the defendant said

he was going 55 miles an hour, while the officer testified the defendant was traveling at 61 miles an hour. Accordingly, this Court affirmed the trial court's 38.23 instructions because this state of the evidence raised a disputed fact issue of whether the officer reasonably believed the defendant was speeding. *Madden, supra* at 511.

The evidence must also be "affirmatively contested." *Id.* *Madden* illustrates how evidence becomes contested. In *Madden*, the officer testified the defendant was speeding, and the defendant denied he was speeding. This conflict in testimony constituted affirmative evidence requiring a 38.23 instruction. *Madden, supra* at 514. The affirmative evidence in this case was the dashcam and photographic evidence refuting Connell's claim he did not see the plate.

Finally, the evidence must be material to the legality of the stop. Connell's sole basis for the stop was that Appellant's truck lacked a rear license plate.³ The issue whether Connell saw the plate determines the legality of the stop. If he saw the

³ Section 504.943 of the Transportation Code declares that a person commits an offense by operating a motor vehicle "that does not display two plates," both of which must comply with "rules regarding the placement of license plates" promulgated by the Texas Department of Motor Vehicles. Tex. Transp. Code §504.943(a). That department issued a rule that every registered vehicle "must display two license plates, one at the exterior front and one at the exterior rear of the vehicle that are securely fastened at the exterior front and rear of the vehicle." 43 Tex. Admin. Code §217.27(b)(1). Appellant's license plate appears to be a 30-day renewable temporary tag. Such tags "must be displayed in the rear window of the vehicle so that the tag is clearly visible and legible when viewed from the rear of the vehicle[.]" unless the vehicle does not have a rear window. Tex. Transp. Code §502.095(f). In that case, "the temporary tag must be attached on ... the vehicle to allow ready inspection." *Id.*

plate, but stopped Appellant anyway, his stop was illegal. Thus, the issue is material to the legality of the stop. Because all the requirements were met for a 38.23 instruction, the trial court erred in refusing the charge under well established law. *Madden, supra*; *Stone v. State*, 703 S.W.2d 652, 653 (Tex.Crim.App. 1986)(dispute between officer and driver and passenger whether the driver was driving carefully or recklessly entitled defendant to 38.23 instruction); *Morr v. State*, 631 S.W.2d 517, 518 (Tex.Crim.App. 1982)(38.23 instruction warranted where officer and driver dispute whether the latter was speeding and weaving); *Jordan v. State*, 562 S.W.2d 472, 473-74 (Tex.Crim.App. 1978)(officer testified witness told him the defendant was armed, but witness' denial created a factual dispute entitling defendant to a 38.23 instruction); *Mills v. State*, 296 S.W.2d 843 (Tex.App. – Austin 2009, *pet. ref'd*)(defendant entitled to 38.23 instruction where dashcam video indicated the officer could not have witnessed the traffic offense he claimed he had).

The Court of Appeals decided that Connell was merely “mistaken.” *Chambers* at 11-14. Assuming *arguendo* that conclusion to be true, it underscores the Court of Appeals' misunderstanding of the requirements for the entitlement of a 38.23 instruction. The issue is whether Connell's belief was reasonable. As this Court put it: “Even police officers may be mistaken about an historical fact such as ‘speeding,’ as long as that mistake was not unreasonable. Of course, evidence that appellant was

not, in fact, speeding is highly probative of whether [the officer] was reasonable in thinking that he was speeding,” which is exactly the sort of factual issue Article 38.23 reserves to juries for resolution. *Madden, supra* at 508 n.7. As this Court has more recently put it, “if there is a dispute about whether a police officer was genuinely mistaken, or was not telling the truth, about a material historical fact upon which his assertion of probable cause or reasonable suspicion hinges, an instruction under Article 38.23(a) would certainly be appropriate.” *Robinson v. State*, 377 S.W.3d 712, 720-21 (Tex.Crim.App. 2012).

An instruction pursuant to Article 38.23 would have permitted the jury to decide whether Connell’s belief that Appellant’s truck lacked a plate was reasonable. In light of his sworn testimony and his own dashcam and other evidence, this was the most hotly contested issue in this case. It was the only crucial issue for the factfinder to resolve. The trial court should have granted Appellant’s counsel’s request and properly instructed the jury.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this Court to reverse the appellate court's judgment and remand the case to the trial court for a new trial.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE: By affixing my signature above I hereby certify that this document contains a word count of 1635 and therefore complies with Tex.R.App.P. 9.4(i)(3).

CERTIFICATE OF SERVICE: I hereby certify, by my signature above, that a true and correct copy of the above and foregoing *Appellant's Brief on the Merits* has been electronically delivered to the Williamson County District Attorney's Office, via Efile and Serve, to Rene Gonzalez, rene.gonzalez@wilco.org, and to Stacey Soule, the State Prosecuting Attorney, stacey.soule@spa.texas.gov, on November 18, 2019.

APPENDIX

Dashcam Snapshot of Back of Appellant's Truck

Photograph of Back of Appellant's Truck

Photograph of License Plate

NW02

STATE'S
EXHIBIT

2

PENGAD 800-831-6989

DW

4-10-18



STATE'S
EXHIBIT
6
4-10-18

TEXAS 30 DAY PERMIT
THIS VEHICLE IS TEMPORARILY REGISTERED WITH PERMIT #

631648G

Effective Date 07-14-2016 11:02:48 AM

EXPIRES 08-13-2016 11:59:59 PM

1996 FORD

VIN: 1FTHF25H0TLA17055

ISSUED BY: WILLIAMSON CTY

RECEIPT FOR PERMIT MUST BE CARRIED IN THE VEHICLE AT ALL TIMES

STATE'S
EXHIBIT

7

PENGAD 800-631-6989

AW 4-10-18